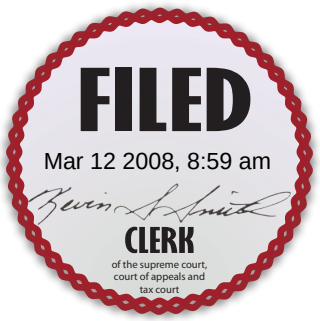

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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY A. JOHNSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 11A01-0707-PC-344
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Robert J. Lowe, Judge
Cause No.11C01-0401-FB-4

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Timothy Johnson appeals from the post-conviction court's denial of his motion to correct error, filed after the post-conviction court granted summary judgment to the State on Johnson's petition for post-conviction relief. For our review, Johnson raises several issues, which we consolidate and restate as whether the post-conviction court properly entered summary judgment on the issues of ineffective assistance of Johnson's trial and appellate counsel. Concluding that there is no genuine issue of material fact precluding summary judgment because Johnson cannot prevail on his ineffective assistance claims, we affirm.

Facts and Procedural History

The facts underlying Johnson's convictions are more fully detailed in Johnson v. State, No. 11A04-0409-CR-512 (Ind. Ct. App., May 31, 2005), trans. denied. Briefly, police responded to a 911 call from a child at Johnson's residence, where they found items that could be used to manufacture methamphetamine. Following a jury trial, Johnson was convicted of dealing in a schedule II controlled substance, a Class B felony, and neglect of a dependent, a Class D felony. He was sentenced to twenty years for dealing in methamphetamine and three years for neglect of a dependent; the sentences were to run concurrently. Johnson appealed his sentence, and we reduced his sentence from twenty years to fifteen years for his dealing conviction and from three years to two years for his neglect of a dependent conviction. See id. at 7.

In late 2006, Johnson filed a pro se petition for post-conviction relief, in which he

alleged as grounds for relief ineffective assistance by his trial and appellate counsel.[1] Attached to Johnson's petition were various documents from his trial, including excerpts of the transcript. The documents show that Johnson's trial counsel, Robert Miller, negotiated a plea agreement with the State that Johnson ultimately rejected. Johnson "verbally fired" Miller after refusing to sign the plea agreement. Revised Appendix of Appellant at 19. Miller subsequently filed a motion to withdraw his appearance, stating that Johnson had fired him and that he believed the attorney-client relationship had "deteriorated to the point that they are incapable of providing effective legal representation in that [Johnson] refuses to communicate with counsel regarding preparation for trial." Id. at 48. Miller's motion was denied pending entry of an appearance by successor counsel. The transcript shows that on the day of trial, Miller appeared in court for Johnson as no other attorney had entered an appearance. The following exchange occurred between Miller, Johnson, and the trial judge:

> [Court]: . . . Mr. Johnson, do you wish to discharge Mr. Miller and represent yourself in this case?
> [Johnson]: The only thing I can accept is to be discharged and released immediately.
> [Court]: Is that the only answer you're going to give me, sir? I want you to understand that your request to discharge Mr. Miller will be denied, unless you answer my questions, sir.
> [Johnson]: The only thing I can accept is to be discharged and released immediately.
> [Court]: Your request is denied, Mr. Miller.
> * * *
> [Miller]: . . . There was one matter additionally that I would like to be made part of the record and that is that my client has indicated to me that it is his desire, which I guess I should abide, that I say or do nothing during the

[1] Johnson also alleged "Waiver of Rights; Violation of Due Process; Competency; and Special Prosecutor Sentencing" as grounds for relief in his petition. Revised Appendix of the Appellant at 4-5. Johnson does not address any of these grounds for relief in his appellate brief.

> course of the trial including the jury selection process, the cross examination of witnesses, the presentation of evidence and closing. So I just wanted to make the court aware that that is how the defendant will proceed with the trial.
> [Court]: Mr. Miller, and I am not asking you to divulge any attorney/client privilege, be fully aware of that, but in a shorthand rendering of the facts, do you believe that instruction from your client to be knowingly, intelligently and voluntarily made?
> [Miller]: Yes, I do.
> * * *
> [Miller]: . . . I have been notified by both Mr. Johnson as well as a woman claiming to hold power of attorney that my services were terminated sometime in late May. I did continue to prepare for trial, but Mr. Johnson, again, advised me this morning that my services were terminated in May and that he does not wish me to be present.

Id. at 65-68.[2]

The State ultimately moved for summary judgment on Johnson's petition for post-conviction relief, alleging that because Johnson "made it impossible, through his own personal actions, for trial counsel to provide any assistance to him at all," Johnson failed to allege any facts supporting post-conviction relief. Id. at 105 (emphasis in original). The trial court granted the State's motion for summary judgment:

> 6. . . . It is undisputed that Johnson fired Miller on June 1, 2004 and instructed him in no uncertain terms not to do or say anything if present at trial, and that Miller only was present at trial because the Court would not grant his Motion to Withdraw. Johnson fails to meet his burden of proof on the undisputed facts as to what Miller did or failed to do after June 1, 2004 as it is objectively reasonable for an attorney to say and do nothing after his client has clearly told him that he is fired and instructs him to say and do nothing. Johnson fails to meet his burden of proof on the undisputed facts as to what Miller did or failed to do before June 1, 2004 as it is impossible to show Miller would not have corrected any alleged deficiencies by trial time but for the

[2] We noted in our opinion on direct appeal that "Johnson would not aid in his defense or answer any questions directed at him by the trial judge or anyone else. Whenever he was addressed during the proceedings, he would respond that the 'only thing [he] c[ould] accept [was] to be discharged and released immediately.'" Johnson, No. 11A04-0409-CR-512, slip op. at 4.

> firing and instructions. Further, to allow Johnson to prevail on this issue is to invite Defendants similarly situated to create error in future trials. The State is entitled to entry of Summary Judgment on the issue of ineffectiveness of trial counsel.
>
> 7. As trial counsel is found not ineffective, appellate counsel cannot be ineffective for failure to raise the issue. . . .

Id. at 61A. Johnson filed a motion to correct error that was denied. Johnson then initiated this appeal.

Discussion and Decision

I. Standard of Review

Post-conviction procedures do not afford petitioners an opportunity for a "super appeal." Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997), cert. denied, 525 U.S. 1148 (1998). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; Ind. Post-Conviction Rule 1(1). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. P-C.R. 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

In the case at hand, the trial court granted the State's motion for summary disposition under Indiana Post-Conviction Rule 1(4)(g). This rule provides, in relevant part:

The court may grant a motion by either party for summary disposition of the

> petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

When a post-conviction court disposes of a petition under subsection (g), we review the lower court's decision as we would that of a motion for summary judgment. Hough v. State, 690 N.E.2d 267, 269 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998); Allen v. State, 791 N.E.2d 748, 753 (Ind. Ct. App. 2003), trans. denied. We face the same issues that were before the post-conviction court and follow the same process. Allen, 791 N.E.2d at 753. On review, the appellant has the burden of persuading us that the post-conviction court erred and we must resolve all doubts about facts, and the inferences to be drawn therefrom, in favor of the nonmovant. Id.

Additionally, Johnson filed a motion to correct error regarding the post-conviction court's grant of summary judgment for the State. We review a decision to deny a motion to correct error for abuse of discretion. Hlinko v. Marlow, 864 N.E.2d 351, 353 (Ind. Ct. App. 2007), trans. denied. An abuse of discretion is found when the court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom. Id. An abuse of discretion also results from a decision that is without reason or is based upon impermissible reasons or considerations. Palmer v. Comprehensive Neurologic Servs., P.C., 864 N.E.2d 1093, 1102 (Ind. Ct. App. 2007), trans. denied.

II. Ineffective Assistance of Counsel

Johnson contends that both his trial and appellate counsel were ineffective in representing him. However, because of the procedural posture of this case, we will address

whether his claims created a genuine issue of material fact requiring a hearing rather than a summary disposition.

When reviewing ineffective assistance of counsel claims, we use the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong, the petitioner must establish that counsel's performance was deficient; that is, the performance fell below an objective standard of reasonableness, thereby denying the petitioner the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. Terry v. State, 857 N.E.2d 396, 402-03 (Ind. Ct. App. 2006), trans. denied. We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions. Id. at 403. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. Under the second prong, the petitioner must demonstrate prejudice; that is, petitioner must demonstrate a reasonable probability that the result of the trial would have been different if counsel had not made the errors. Id. If our confidence that the result would have been the same is undermined, we will find that a reasonable probability exists. Id.

"The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in her performance and that the deficiency resulted in prejudice." Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: 1) when counsel's actions deny the defendant his right of appeal; 2) when counsel fails to raise issues that should have been raised on appeal; and 3) when

counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. 2006)

Generally, effective representation of counsel is a mixed question of fact and law. Strickland, 466 U.S. at 698; Hough, 690 N.E.2d at 272. As such, the granting of summary judgment without any evidentiary hearing is unusual. Lloyd v. State, 717 N.E.2d 895, 900 (Ind. Ct. App. 1999), trans. denied. An evidentiary hearing is typically required to develop all of the facts relevant to the claim, as an ineffective assistance of counsel claim revolves around the unique facts of that case and many of those facts may exist outside of the record. See Sherwood v. State, 453 N.E.2d 187, 189 (Ind. 1983). An evidentiary hearing may not be required, however, when the State accepts as true all of the petitioner's factual allegations or when it is clear the allegations are baseless or meritless. Lloyd, 717 N.E.2d at 900 (citing 24 C.J.S. Criminal Law § 1633(b)).

Johnson's petition for post-conviction relief contains twenty-five handwritten pages of allegations against his trial and appellate counsel. Johnson alleges therein that on June 1, 2004, he fired his counsel when they appeared in court for a guilty plea hearing. Miller thereafter filed a motion to withdraw, but the trial court denied the motion until successor counsel filed an appearance. The trial transcript excerpts that Johnson attached to his petition show that on the day of his trial, Miller appeared because Johnson had not hired successor counsel. Miller informed the court that Johnson wanted him to say and do nothing during the trial. The trial court tried to engage Johnson in a discussion regarding his wishes

with respect to counsel, but Johnson refused to respond in any way other than to repeatedly say, "The only thing I can accept is to be discharged and released immediately." See Revised App. at 65, 67.

Given these circumstances, we hold that Johnson cannot prove Miller rendered ineffective assistance. "A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error." Ellis v. State, 707 N.E.2d 797, 803 (Ind. 1999). In Hardy v. State, 786 N.E.2d 783 (Ind. Ct. App. 2003), trans. denied, the petitioner alleged that his trial counsel was ineffective for failing to offer comments at his sentencing hearing. We held that his post-conviction claim was waived because he had presented ineffective assistance of counsel claims on direct appeal. Id. at 787. Nonetheless, we stated that he was not entitled to reversal on the merits because when the trial court asked the petitioner at his sentencing hearing if he wished to make a statement, he indicated that he did not want to make a statement as it might be construed as an admission of guilt, and further stated that he did not wish his counsel to say anything on his behalf because "I don't feel that he performed his job to show what I wanted." Id. Because the petitioner instructed his attorney to remain silent, "both for tactical reasons and as an expression of dissatisfaction with counsel's performance to that point . . . [he] invited the error, if any, and cannot now gain reversal on that basis." Id.

Similarly, Johnson fired his counsel and instructed him to stand silent at trial when the trial court would not allow counsel to withdraw his appearance. To the extent Johnson's claims rest on conduct by his counsel prior to his firing, Johnson cannot show that any

deficiencies in investigation and consultation would not have been remedied by the time of trial. In fact, Miller stated at trial that he had continued to prepare for Johnson's trial, "but Mr. Johnson, again, advised me this morning that my services were terminated in May and that he does not wish me to be present." Revised App. at 68. To the extent Johnson's claims rest on counsel's conduct at trial, counsel was apparently doing exactly what Johnson instructed him to do. Johnson had, but did not take advantage of, the opportunity to engage in a meaningful discourse with the trial court if he did not in fact wish counsel to stand silent. It is clear from the pleadings that Johnson invited error, if any, and cannot prevail on his claim of ineffective assistance of trial counsel.

Johnson also claims his appellate counsel was ineffective for not raising the issue of his trial counsel's ineffectiveness. On this claim, too, it is clear from the pleadings that Johnson cannot prevail. Appellate counsel raised a sentencing issue on which Johnson prevailed. As we have held above, the ineffective assistance of trial counsel claim would have failed. Failing to raise what would have been a meritless claim is not deficient performance. See Hall v. State, 646 N.E.2d 379, 382 (Ind. Ct. App. 1995), trans. denied. Moreover, the omission of an ineffective assistance of trial counsel claim on direct appeal did not prejudice Johnson, as he was still able to raise the claim in post-conviction proceedings. See Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998) (holding that a claim of ineffective assistance of counsel, if not raised on direct appeal, may be presented in post-conviction proceedings), cert. denied, 528 U.S. 861 (1999); Bieghler v. State, 690 N.E.2d 188, 200-01 (Ind. 1997) (holding that if a defendant presents a claim of ineffective assistance of counsel

on direct appeal, he is foreclosed from subsequently relitigating that claim on post-conviction even if based upon different grounds), cert. denied, 525 U.S. 1021 (1998). Accordingly, Johnson cannot prevail on his claim of ineffective assistance of appellate counsel.

Conclusion

Because there is no genuine issue of material fact regarding the assistance provided by Johnson's trial and appellate counsel, the post-conviction court properly entered summary judgment as a matter of law for the State and did not abuse its discretion in denying Johnson's motion to correct error. The post-conviction court's summary disposition of Johnson's petition for post-conviction relief is therefore affirmed.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.